89-33

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RIQUE DON BOBBITT,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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30 pp

QUESTION PRESENTED

(1) Whether a retroactive application of the Texas Court of Criminal Appeals' opinion in *Meshell v. State,* 739 S.W.2d 246 (Tex. Cr. App. 1987), which declared this state's Speedy Trial Act unconstitutional (Articles 28.061, 32A.01 and 02, Texas Code of Criminal Procedure), amounts to an *ex post facto* violation as it relates to petitioner, who had prevailed on his claim in the Court of Appeals?

Petitioner submits that the Texas Court of Criminal Appeals has decided an important question of federal law which is in conflict with applicable decisions of this Court. Rule 17.1(c), Supreme Court Rules.

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RIQUE DON BOBBITT,
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THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

OPINIONS BELOW

The opinion of the Court of Appeals, First Supreme Judicial District of Texas, sitting at Houston, Texas, reversing the district court, dismissing the indictment, and barring further prosecution, was unpublished. It is reprinted in the Appendix at A-1, together with the unpublished opinion of the Texas Court of Criminal Appeals sustaining the state's posture that the unconstitutionality of the Act should be retroactive, and refusal on petitioner's motion for rehearing.

JURISDICTION

The original opinion of the Texas court of appeals was issued on March 12, 1987. The state filed its first petition for review on April 27, 1987. It was refused on April 27, 1988. The state filed its second petition for review on May 11, 1988. It was granted on May 25, 1988. The brief in support of petition for review was filed on June 23, 1988. Petitioner filed his response to the state's brief on August 8, 1988. On April 12, 1989, the Texas Court of Criminal Appeals reversed the judgment of the court of appeals and affirmed the trial court claiming, silently, that the unconstitutionality of the Speedy Trial Act applied retroactively. Petitioner's motion for rehearing was overruled without written opinion on May 10, 1989.

This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves U.S.C. Const. Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.

STATEMENT OF THE CASE

Petitioner was arrested on October 12, 1985, and charged with public intoxication and possession of cocaine. The public intoxication charge was filed in the Municipal Court of the City of Pasadena, Texas. Pasadena Municipal Court Judge Dan Weathers dismissed the public intoxication charge pursuant to the Speedy Trial Act. (Art. 32A.02, *Texas Code of Criminal Procedure.*) In the cocaine case, petitioner filed a pretrial plea in bar

arguing that the dismissal of the public intoxication charge required the court to dismiss the possession of cocaine charge pursuant to Art. 28.061, Texas Code of Criminal Procedure. The trial court overruled the plea in bar. (See court of appeal's opinion).

Article 28.061 provides that:

> If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial as required by Art. 32A.02 is sustained, the trial court shall discharge the defendant. A discharge under this Article is a bar to any further prosecution of the offense discharged or for any other offense arising out of the same transaction.

At the pretrial hearing, the state stipulated that the public intoxication and the cocaine charges arose from the same transaction. The court of appeals reversed the trial court, dismissed the indictment, and barred further prosecution premised upon *Kalish v. State,* 662 S.W.2d 595 (Tex. Cr. App. 1983).

REASONS FOR GRANTING THE WRIT

The decision in *Meshell v. State,* 739 S.W.2d 246, declaring the Speedy Trial Act unconstitutional, was issued on July 1, 1987. The petitioner committed the offense on October 12, 1985, went to trial on March 2 and 3, 1986, was convicted, and gave notice of appeal. The Texas court of appeals, in an unpublished opinion, dismissed the indictment and barred further prosecution on March 12, 1987.

Clay v. Lynaugh, 846 F.2d 8 (5th Cir. 1988) and *Rubino v. Lynaugh,* 845 F.2d 1266 (5th Cir. 1988), and several opinions of this Court render an *ex post facto* application of this judicial decision, notwithstanding the statutory implication, invalid. Consequently, the language in *Jefferson v. State,* 751 S.W.2d 502 (Tex. Cr. App. 1988), viz, an unconstitutional statute is void from its inception and cannot provide a basis for any right or relief is, at best, ill conceived.

The language in *Jefferson* was apparently drawn from *Norton v. Shelby County,* 118 U.S. 425, 442, 3 L.Ed. 178, 186, 6 S. Ct. 1121; however, that principle was repudiated in *Chicote County Drainage v. Baxter State Bank,* 308 U.S. 371, 84 L.Ed. 329 (1940):

> The Courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a loss; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is a operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relation, individual and corporate, and particular conduct, private and official. Questions of rights claim to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of

> the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of the courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

Id. at 331, 332.

In *Beazell v. Ohio,* 269 U.S. 167, 169-170, 70 L.Ed. 216, 46 S. Ct. 68 (1925), Mr. Justice Stone summarized for the Court the characteristics for an *ex post facto* law:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime and act previously committed, which was innocent when done; which makes more burdensome the punishment for the crime after its commission, *or which deprives one charged with* [*a*] *crime of any defense available according to law at the time when the act was committed,* is prohibited as *ex post facto.*

Accord, Miller v. Florida, 482 U.S. ____ 96 L.Ed.2d 351, 107 S. Ct. ____ (1987) and *Dobbert v. Florida,* 432 U.S. 282, 53 L.Ed.2d 344, 97 S. Ct. 2290 (1977).

Rubino, supra, the companion case to *Clay,* cited *Miller,* wherein Justice O'Conner wrote, "a change in the law that alters a substantial right can be *ex post facto* 'even if the statute takes a seemingly procedural form.' "

Petitioner concedes the Act was procedural in form, but when the decision by the Texas Court of Criminal Appeals declaring it unconstitutional was applied retroactively, it deprived him of an available defense he had

on the date of the offense, at trial, and in the court of appeals, viz, the state's failure to be ready for trial within the time prescribed by the Act and the petitioner's proof thereof. *Chicote County Drainage,* supra, *Beazell v. Ohio,* supra, *Miller v. Florida,* supra, *Dobbert v. Florida,* supra.

Furthermore, to hold that the *ex post facto* application of otherwise unassailable changes in statutory law presents no state and federal due process issue runs afoul of *Rubino, Clay, Miller,* and *Kring v. Missouri,* 107 U.S. 221, 2 S. Ct. 443, 27 L.Ed. 506 (1883).

The Texas Court of Criminal Appeals declined to answer petitioner's claim of *ex post facto* just as it did in *Ex parte Clay,* 675 S.W.2d 765 (Tex. Cr. App. 1984).

CONCLUSION

For the foregoing reasons, petitioner Rique Don Bobbitt asks that his petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS
First Supreme Judicial District

OPINION

NO. 01-86-00549-CR

RIQUE DON BOBBITT, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
of Harris County, Texas
Trial Court Cause No. 434,970.

Pursuant to a plea bargain agreement, appellant pled guilty to possession of cocaine of less than 28 grams, and the trial court assessed punishment at three years confinement, probated, and a $1,000.00 fine. *See* Tex. Code Crim. P. Ann. art. 44.02 (Vernon 1979).

The record reflects that at the time of his arrest, appellant was charged with public intoxication and possession of cocaine. The public intoxication charge was filed in the Municipal Court for the City of Pasadena, Texas. Pasadena Municipal Court Judge Dan Weathers dismissed the public intoxication charge, pursuant to the

Speedy Trial Act. Tex. Code Crim. P. Ann. art. 32A.02 (Vernon Supp. 1987).

In the instant case, appellant filed a pretrial plea in bar arguing that the dismissal of the public intoxication charge required the court to dismiss the possession of cocaine charge, pursuant to Tex. Code Crim. P. Ann. art. 28.061 (Vernon Supp. 1987). The trial court overruled the plea in bar.

Appellant's sole point of error contends that the trial court erred in overruling his plea in bar, because the public intoxication and the cocaine charges arose from the same transaction; the public intoxication complaint had been discharged, pursuant to article 32A.02; and therefore, dismissal of the cocaine charge was required by article 28.061.

Article 28.061 provides that:

> If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial as required by art. 32A.02 is sustained, the trial court shall discharge the defendant. A discharge under this article is a bar to any further prosecution for the offense discharged or for any other offense arising out of the same transaction.

At the pretrial hearing, the State stipulated that the public intoxication and the cocaine charges arose from the same transaction, as defined by *Kalish v. State,* 662 S.W.2d 595 (Tex. Crim. App. 1983).

In *Kalish,* 662 S.W.2d at 600, the court held that:

> [W]hen a person is detained, placed under restraint or taken into custody by a peace officer, all such

> chargeable voluntary conduct in which the person was then and there engaged, constituting an offense continuing in nature, arises out of the same transaction. . . . [W]e find that [the offense of possession of cocaine and the offense of public intoxication, being committed contemporaneously by appellant, were of the same transaction.

The instant case is indistinguishable from *Kalish.* Both involve the same offenses, public intoxication and possession of cocaine; both involve nearly identical factual observations and testimony by the arresting officer; and both involve the dismissal of a municipal court prosecution barring prosecution in a district court.

The State contends that *Kalish* should be overruled. We have recently relied on *Kalish* to grant relief in a nearly identical situation. *See Ex parte Maddux,* No. 01-86-00462-CR (Tex. App.—Houston [1st Dist.] December 11, 1986). Furthermore, we have no authority to overrule *Kalish.*

The State attempts to distinguish *Kalish,* alleging that the speedy trial issue herein was wrongly decided by the Pasadena Municipal Court. As it did in the trial court, the State attempts to relitigate the order of the Pasadena Municipal Court.

Article 28.061 is a mandatory statute. It does not provide that the defendant shall be discharged only if the trial court's decision granting the speedy trial motion is correct. No authority allows the district court or this Court to review the correctness of the municipal court's judgment. The State's interpretation would allow it to appeal the municipal court judgment, in violation of art. V, sec. 26 of the Texas Constitution. *Ex parte*

Maddux, slip op. at 2 (opinion on State's motion for rehearing). The State does not contend in this argument that the judgment of the municipal court is void, and therefore subject to collateral attack.

The State next contends that the caption of the Speedy Trial Act violates art. III, sec. 35 of the Texas Constitution. In *Baggett v. State,* No. 634-85 (Tex. Crim. App. Jan. 14, 1987) (not yet reported), the court held that, as a result of the amendment to art. III, sec. 35 of the Texas Constitution, courts no longer have the power to declare an act of the legislature unconstitutional due to a defective caption. *Baggett,* slip op. at 2.

Finally, the State contends, as it did in the district court, that the Speedy Trial Act is an unconstitutional violation of the separation of powers doctrine of article II, section 1 of the Texas Constitution.

In *Bedford v. State,* 703 S.W.2d 775, 779 (Tex. App. —Houston [14th Dist.] 1985), the court persuasively rejected an attack on the constitutionality of the Speedy Trial Act. It held:

> We find no authority holding that the legislature may not constitutionally impose time limitations for the prosecution of cases and provide for sanctions, including dismissal, when the state fails to timely prosecute defendants. To the contrary, the Code of Criminal Procedure embodies numerous examples of statutes which provide for such time limitations and sanctions. See, e.g., Tex. Code Crim. Proc. Ann. arts. 12.01-12.07, 51.14. We believe statutes of limitations provide the closest analogy. No one can seriously question the legislature's authority to enact such statutes and provide sanctions for the failure to comply with them. It has been stated that "enact-

> ments limiting the time for the prosecution of offenses are measures of public policy only and are entirely subject to the will of the legislature. . . ." Hill v. State, 146 Tex. Crim. 333, 171 S.W.2d 880, 882 (1943), quoting 22 C.J.S. Criminal Law section 224 (1961). . . . Articles 32A.02 and 28.061 appear to us to be no more than "enactments limiting the time for the prosecution of offenses," and, as such, are properly within the sphere of legislative authority.

Accord, Hernandez v. State, 713 S.W.2d 697, 699 (Tex. App.—Corpus Christi 1986, no pet.); *Ex parte Maddux,* slip op. at 3 (opinion on State's motion for rehearing).

The point of error is sustained.

The judgment of the district court is reversed, and the indictment is dismissed. Further prosecution for the offense alleged therein is barred.

/s/ MURRY B. COHEN
Murry B. Cohen
Justice

Justices Smith and Hoyt sitting.

Do not publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered 12 March 1987.

True copy attest:

/s/ KATHRYN COX
Kathryn Cox
Clerk of the Court

NO. 417-87

RIQUE DON BOBBITT, Appellant

v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review
from the First Court of Appeals

(HARRIS County)

OPINION ON STATE'S MOTION FOR REHEARING

Appeal is taken from a conviction for possession of cocaine of less than 28 grams. Appellant filed a pre-trial motion to dismiss, alleging that the prosecution was barred. After a hearing, the trial court denied appellant's motion. Appellant then entered a plea of guilty pursuant to a plea bargain agreement, while reserving the right to appeal on his pre-trial motion. The trial court assessed his punishment at three years imprisonment, probated and a $1,000 fine.

In his pre-trial motion appellant alleged the prosecution was barred because a public intoxication case, which arose from the same transaction, had been dismissed because of a violation of the Texas Speedy Trial Act. Articles 28.061 and 32A.02, V.A.C.C.P. At the hearing on the motion the State stipulated to the fact that both the public intoxication charge and the possession of cocaine charge arose from the same transaction. On direct appeal, the Court of Appeals decided since the Speedy Trial Act was not unconstitutional, Art. 28.061 worked to bar the State from proceeding against appel-

lant on the possession of cocaine charge. Bobbitt v. State, unpublished (No. 01-86-00549-CR, Ct. App.—1st Dist., March 12, 1987).

We granted the State's motion for rehearing to consider the State's third ground for review: whether the Speedy Trial Act is unconstitutional because it violates the separation of powers provisions of Article II, Section 1 of the Texas Constitution. This is not a review of the Municipal Court decision that the public intoxication prosecution was barred by the proscriptions of Article 32A.02, V.A.C.C.P. Instead, this is a review of the Court of Appeals' decision that the dismissal of the public intoxication charge on Art. 32A.02 grounds barred prosecution of the possession of cocaine charge under Article 28.061, V.A.C.C.P. This Court has recently handed down several decisions which control this review.

In Meshell v. State, 739 S.W.2d 246 (Tex. Cr. App. 1987), this Court held that Articles 32A.02 and 28.061, V.A.C.C.P., were unconstitutional because they violated the separation of powers provision of Article II, Section 1 of the Texas Constitution. The Speedy Trial Act was void in its entirety, including Article 28.061, V.A.C.C.P. Maddux v. State, 757 S.W.2d 737 (Tex. Cr. App. 1988). This Court has also explained the Speedy Trial Act was void ab initio. As such, the Speedy Trial Act "justified no act performed under it." Sanchez v. State, 751 S.W. 2d 514 (Tex. Cr. App. 1988). A defendant cannot use a prior dismissal under the Speedy Trial Act to bar a subsequent prosecution for another offense under the authority of Art. 28.061, V.A.C.C.P. *Ex parte Maddux, supra* at 738. We sustain the State's third ground for review.

We reverse the judgment of the Court of Appeals. The judgment of the trial court is affirmed.

PER CURIAM

(Delivered April 12, 1989)

En Banc

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Official Notice
Court of Criminal Appeals

RE: Case No. 0417-87
STYLE: Bobbitt, Rique Don

May 10, 1989

On this day the Appellant's Motion for Rehearing was denied.

COA#: 01-86-00549-CR Thomas Lowe, Clerk

Supreme Court, U.S.
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v.

STATE OF TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Texas Court of Criminal Appeals' retroactive application of *Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987), declaring the Texas Speedy Trial Act unconstitutional, a violation of the *Ex Post Facto* Clause?

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NO. 89-33

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

RIQUE DON BOBBITT,
Petitioner,
v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINIONS BELOW

The opinion of the First Court of Appeals of Texas filed March 12, 1987 is unpublished, but is reproduced as Appendix A-1 to the Petition for Writ of

[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Bobbitt."

Certiorari. *Bobbitt v. State*, No. 01-86-00549-CR. The unpublished opinion of the Texas Court of Criminal Appeals, issued April 12, 1989, is reproduced as Appendix A-6 to the Petition for Writ of Certiorari. *Bobbitt v. State*, No. 417-87.

JURISDICTION

Bobbitt seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Bobbitt's claim is based on the first amendment to the United States Constitution. Also involved herein are Articles 32A.02 and 28.061 of the Texas Code of Criminal Procedure, attached hereto as Appendix A and B.

STATEMENT OF THE CASE

On October 12, 1985, Bobbitt was arrested in Pasadena, Texas, and charged with public intoxication and possession of cocaine. The public intoxication charge was dismissed by the Pasadena Municipal Court under the Texas Speedy Trial Act, Tex. Code Crim. Proc. Ann. art. 32A.02.

The 185th District Court of Harris County, Texas found Bobbitt guilty of the cocaine possession charge. Punishment was assessed at imprisonment for three years, probated, plus a fine of $1000.

On direct appeal, Bobbitt argued that dismissal of the public intoxication charge required dismissal of the cocaine charge as both arose out of the "same transaction" specified in the enforcement provision of the Texas Speedy Trial Act, Tex. Code Crim. Proc. Ann.

art. 28.061. The First Court of Appeals agreed and reversed Bobbitt's conviction. *Bobbitt v. State*, No. 01-86-00549-CR (Tex.App.--Houston [1st Dist.] March 12, 1987).

The Texas Court of Criminal Appeals granted the State's Motion for Rehearing on Petition for Discretionary Review. On April 12, 1989, the high court reversed the holding of the Court of Appeals and affirmed the trial court's judgment. The court cited its recent decision in *Meshell v. State*, 739 S.W.2d 246 (Tex.Crim.App. 1987) declaring the state's speedy trial act, including Article 28.061, as unconstitutional and, therefore, void *ab initio*. Bobbitt's motion for rehearing was denied on May 10, 1989.

STATEMENT OF FACTS

The facts of the offense are adequately set forth in the opinions of the First Court of Appeals and Texas Court of Criminal Appeals. See Appendix A-1 and A-6 to the petition.

SUMMARY OF ARGUMENT

The Texas Speedy Trial Act, Article 32A.02 of the Texas Code of Criminal Procedure and its enforcement provision, Article 28.061 were procedural statutes designed to assist a defendant in securing his right to a speedy trial. The statute was not intended to nor did it create a right. The Texas Court of Appeals, however, found the statute unconstitutional in violation of the separation of powers doctrine of the Texas Constitution. The state high court held the statute to be invalid *ab initio*.

The court's decision striking down the statute merely changed a mode of procedure and did not alter

any substantial personal rights; hence, its application to Bobbitt's case did not run afoul of the constitutional proscription against *ex post facto* laws. The right to a speedy trial remains untouched and inherent in the federal and state constitutions. Invalidation of the act, therefore, did not leave Bobbitt without any defenses against the elements of the offense charged with, or increase his punishment or aggravate his crime.

Moreover, it is well established that an unconstitutional statute, whether federal or state, is no statute at all. No rights, duties, power or protection exist under it. Bobbitt does not dispute the state statute's unconstitutionality. Instead, he challenges the retroactive invalidity because it strips him of what he characterizes as an available defense to the charges against him. Bobbitt's speedy trial right and its defenses are not and never were vested in the speedy trial act. Rather, they are grounded in the speedy trial clauses of the United States and Texas Constitutions. Consequently, retroactivity does not result in the loss of any rights or defenses.

Additionally, Bobbitt's reliance on prior decisions of the Court of Appeals for the Fifth Circuit addressing retroactive application of judicial decisions is misplaced. The cases are vastly distinguishable from Bobbitt's.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Bobbitt has advanced no special or important reason in this case, and none exists.

II.

RETROACTIVE APPLICATION OF *MESHELL V. STATE*, 739 S.W.2D 246 (TEX.CRIM.APP. 1987) DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE BECAUSE IT DOES NOT PUNISH AS A CRIME AN ACT PREVIOUSLY COMMITTED, WHICH WAS INNOCENT WHEN DONE; DOES NOT MAKE MORE BURDENSOME THE PUNISHMENT FOR A CRIME AFTER ITS COMMISSION, AND DOES NOT DEPRIVE ONE CHARGED WITH A CRIME OF ANY DEFENSE AVAILABLE ACCORDING TO LAW AT THE TIME WHEN THE ACT WAS COMMITTED.

A. Statutory History of the Texas Speedy Trial Act.

The Texas Speedy Trial Act and its enforcement provision became effective July 1, 1978. Tex. Code

Crim. Proc. arts. 32A.01, 32A.02, 28.061 (Vernon 1989). The Texas Court of Criminal Appeals had defined the act as one which provided procedural guidelines for statutory enforcement of a defendant's constitutional right to a speedy trial. *Ordunez v. Bean*, 579 S.W.2d 911 (Tex.Crim.App. 1979). The legislature's authority to enact such guidelines was found in the Texas Constitution:

> The Supreme Court shall have power to make and establish rules of procedure *not inconsistent with the laws of the State* for the government of said court and the other courts of this State to expedite the dispatch of business therein.

Tex. Const. art. V, § 25 (emphasis added) (now repealed by Acts 1985, 69th Legislature, S.J.R. No. 14, § 9, approved November 5, 1985). The state high court determined that for the legislature to enact such procedural rules, a right must exist. "Were it otherwise, the procedural legislation would itself create a substantive 'right,' and exceed the grant of power in Article V, § 25, *supra*, thereby encroaching upon another department." *Meshell v. State*, 739 S.W.2d 246, 255 (Tex.Crim.App. 1987).

In Texas, a defendant's right to a speedy trial is derived from the federal and state constitutions. Tex. Const. art. I, §10; U.S. Const. amend VI; *Hull v. State*, 699 S.W.2d 220, 221 (Tex.Crim.App. 1985); *Turner v. State*, 545 S.W.2d 133, 136 (Tex.Crim.App. 1977).

Later analysis by the state high court of the Speedy Trial Act revealed, however, that the act was not directed at providing procedural guidelines for the speedy *commencement of trial* but rather was directed at speeding the *prosecutor's preparation and ultimate*

readiness for trial. Barfield v. State, 586 S.W.2d 538 (Tex.Crim.App. 1979); *Santibanez v. State*, 717 S.W.2d 326 (Tex.Crim.App. 1986); *Ordunez, supra.* As such, the act was a serious encroachment, without the authority of an express constitutional provision, upon the prosecutor's exclusive function in preparing for trial. *Meshell v. State*, 739 S.W.2d at 256. The court held that in granting a defendant such an overly broad power to control a prosecutor's discretion in preparing for trial, the legislature had exceeded its authority to protect a defendant's speedy trial through procedural legislation. *Id.* at 257. Consequently, the legislature had violated the separation of powers doctrine of the Texas Constitution,[2] and, therefore, both Articles 28.061 and 32A.02 were unconstitutional and void in their entirety. *Id.* at 257, 258. Subsequent cases held that because of its unconstitutionality, the Speedy Trial Act was void *ab initio* and as such it did not justify any act performed under it. *Sanchez v. State*, 751 S.W.2d 514 (Tex.Crim.App. 1988); *Jefferson v. State*, 751 S.W.2d 502 (Tex.Crim.App. 1988).

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[2]Article II,§ 1, supra, provides:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

B. Because the Speedy Trial Act was procedural in nature, Bobbitt was not deprived of any defenses by the act being declared unconstitutional.

Bobbitt argues that retroactive application of *Meshell*, as was done is his case, is invalid and a violation of *ex post facto* law. This action, he claims, deprives him of the defense of the state's failure to be ready for trial within the time limits prescribed in the act.

Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto law." U. S. Const. art I, § 9, cl. 3, § 10, cl. § 1. Although the prohibition applies to state legislatures, it has been extended, through the due process clause, to action by the judiciary. *Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964).

The Supreme Court first gave consideration to the scope of *ex post facto* prohibition in *Calder v. Bull*, 3 Dall. 386 (1798). For a law to be *ex post facto*, it must be one which:

1) makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; or

2) aggravates a crime, or makes it greater than it was, when committed; or

3) changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; or

4) alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3 Dall. 386, 390 (1798); *accord*, *Dobbert v. Florida*, 432 U.S. 282, 292 (1977); quoting *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925); *Miller v. Florida*, ___ U.S.___, 107 S.Ct. 2446 (1987)

No *ex post facto* violation occurs, if a change in law does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance,..." *Miller, supra; Dobbert, supra*; *Beazell v. Ohio*, 269 U.S. at 170-71. Furthermore, if the change does not increase the punishment or change the elements of the offense or the ultimate facts necessary to establish the guilt and is merely procedural, there is no *ex post facto* violation. *Weaver v. Graham*, 450 U.S. 24, 29 n. 12 (1981); *Hopt v. Utah*, 110 U.S. 574, 590 (1884); *Dobbert*, 432 U.S. at 293; *Miller*, ___ U.S. at ___, 107 S.Ct. at 2452-53.

Texas caselaw, cited herein, leaves no question that the Speedy Trial Act was intended to be procedural legislation. Bobbitt himself concedes that "the Act was procedural in form." *See* Petition for Writ of Certiorari at 5. Retroactive application of the unconstitutionality of the Speedy Trial Act left "untouched the nature of the crime and the amount or degree of proof essential to conviction." *Hopt*, 110 U.S. at 590. Furthermore, retroactivity did not attach criminality to any act previously done, which was innocent when done, or aggravate any crime theretofore committed, or provide a greater punishment than was prescribed at the time of its commission. *Hopt*, 110 U.S. at 589.

Since the Act related to modes of procedure only, no vested right under the Act existed. Bobbitt argues that retroactivity deprived him of the right under the act to the defense of prosecutorial delay. That type of defense, however, is not an element of the offense necessary to be proved in order to convict Bobbitt. As such, it is not a defense contemplated by the court in *Calder, Beazell and Dobbert*. All of Bobbitt's speedy trial rights and defenses remained available and protected under the constitutions of the United States and the State of Texas.

III.

THE TEXAS SPEEDY TRIAL ACT WAS VOID FROM ITS INCEPTION BECAUSE AN UNCONSTITUTIONAL CRIMINAL STATUTE IS VOID *AB INITIO* AND CONFERS NO BENEFITS OR RIGHTS, BESTOWS NO POWER ON ANYONE AND JUSTIFIES NO ACT PERFORMED UNDER IT.

A. *No exception to the retroactive application of* Meshell *exists.*

Bobbitt argues that declaring the act unconstitutional *ab initio* deprives him of an available statutory defense on which he relied, thus creating a hardship and imposing an unjust liability. Because of this consequence, Bobbitt maintains that the retroactive application of *Meshell* to his case is invalid.

It is well settled that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law. *Chicago, I & L. R. Co. v. Hackett*, 228 U.S. 559 (1913); *United States v. Realty Co.*, 163 U.S. 427 (1896); *Huntington v.*

Worthern, 120 U.S. 97 (1887); *Norton v. Shelby County*, 118 U.S. 425 (1886). It is wholly void and ineffective for any purpose. *Ex parte Royall*, 117 U.S. 241 (1886); *Ex parte Siebold*, 100 U.S. 371 (1879). Since an unconstitutional law is void, it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. *Norton, supra; Chicago, I & L. R. Co., supra*. Furthermore, where the invalidity of an act goes to the power of the legislature to enact the law, and not merely to the form of the enactment, no rights or correlative obligations may arise under such an invalid statute. *Reyes v. State*, 753 S.W.2d 382 (Tex.Crim.App. 1988). *See also* 16 Am Jur.2d Constitutional Law § 256, 724 (1979).

The general rule, however, is subject to exception:

> It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.

Chicote County Drainage v. Baxter State Bank, 308 U.S. 371, 374-375 (1940).

After declaring the Speedy Trial Act unconstitutional and void, the Texas Court of Criminal Appeals, in accord with prior caselaw and caselaw from other jurisdictions regarding unconstitutional statutes, held the act also was void from its inception and could not provide a basis for any right or relief. *Jefferson v. State*, 751 S.W.2d 502 (Tex.Crim.App. 1988); *Reyes v.*

State, supra. See also 12 Tex.Jur.3d Constitutional Law § 41, 548 (1981).

Holding the Speedy Trial Act unconstitutional *ab initio* may have disposed of Bobbitt's statutory claim, but his constitutional claim remains preserved. His substantial right to a speedy trial has not been altered. Consequently, Bobbitt has not suffered any adverse consequences as a result of the retroactive application of *Meshell*. Due process can be satisfied by deciding Bobbitt's speedy trial questions under the federal and state constitutions.

B. Bobbitt's reliance on Fifth Circuit caselaw is misplaced.

Bobbitt cites *Clay v. Lynaugh*, 846 F.2d 8 (5th Cir. 1988) and *Rubino v. Lynaugh*, 845 F.2d 1266 (5th Cir. 1988) to support his contention that retroactive application of *Meshell* is invalid. There are, however, notable distinctions between those cases and *Meshell* which Bobbitt has overlooked or failed to distinguish.

Rubino and *Clay* dealt with Texas' "carving doctrine", a judicially developed rule barring multiple prosecutions and convictions for offenses "carved" out of a single criminal transaction. The doctrine was abandoned in 1982, several years after the commission of the offense in both cases. The Texas Court of Criminal Appeals approved the retroactive application of the elimination of the doctrine in Clay's and Rubino's cases. The Fifth Circuit's concern dealt with the much more apparent, potential consequence of the state high court's action, that of inflicting a greater punishment than the law provided at the time the crime was committed. Both cases were sent back to state court for a determination to that effect.

In Bobbitt's case, demise of the Speedy Trial Act did not, in any devastating method or manner, alter or affect his substantial right, the right to a speedy trial. His right exists intact under the both the United States and Texas Constitutions. Invalidation of the act simply denied Bobbitt a statutory avenue through which to assert his right. It did not foreclose his constitutional one.

CONCLUSION

For these reasons, the state respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

Tex. Code Crim. Proc. art. 32A.01 (Vernon 1989)

Art. 32A.01. Trial priorities

Insofar as is practicable, the trial of a criminal action shall be given preference over trials of civil cases, and the trial of a criminal action against a defendant who is detained in jail pending trial of the action shall be given preference over trials of other criminal actions.

Acts 1977, 65th Leg., p. 1970, ch. 787, § 1, eff. July 1, 1978.

Art. 32A.02. Time limitations

Sec. 1. A court shall grant a motion to set aside an indictment, information, or complaint if the state is not ready for trial within:

(1) 180 days of the commencement of a criminal action if the defendant is accused of a felony;

(2) 90 days of the commencement of a criminal action if the defendant is accused of a misdemeanor punishable by a sentence of imprisonment for more than 180 days; or

(3) 60 days of the commencement of a criminal action if the defendant is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less or punishable by a fine only.

Sec. 2. (a) Except as provided in Subsections (b) and (c) of this section, a criminal action commences for purposes of this article when an indictment, infor-

mation, or complaint against the defendant is filed in court, unless prior to the filing the defendant is either detained in custody or released on bail or personal bond to answer for the same offense or any other offense arising out of the same transaction, in which event the criminal action commences when he is arrested.

(b) If a defendant is to be retried following a mistrial, an order granting a new trial, or an appeal or collateral attack, a criminal action commences for purposes of this article on the date of the mistrial, the order granting a new trial, or the remand.

(c) If an indictment, information, or complaint is dismissed on motion of the defendant, a criminal action commences for the purposes of the article when a new indictment, information, or complaint against the defendant is filed in court, unless the defendant is either detained in custody or released on bail or personal bond to answer for the same offense or any other offense arising out of the same transaction, in which event the criminal action commences when he is detained or released.

Sec. 3. The failure of a defendant to move for discharge under the provisions of this article prior to trial or the entry of a plea of guilty constitutes a waiver of the rights accorded by this article.

Sec. 4. In computing the time by which the state must be ready for trial, the following periods shall be excluded:

(1) a reasonable period of delay resulting from other proceedings involving the defendant, including but not limited to proceedings for the determination of competence to stand trial, hearing on pretrial motions, appeals, and trials of other charges;

(2) any period during which the defendant is incompetent to stand trial;

(3) a period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel, except that a defendant without counsel is deemed not to have consented to a continuance unless the court advised him of his right to a speedy trial and of the effect of his consent;

(4) a period of delay resulting from the absence of the defendant because his location is unknown and:

(A) he is attempting to avoid apprehension or prosecution; or

(B) the state has been unable to determine his location by due diligence;

(5) any period of delay during which the defendant is absent because he is a fugitive or his bail is forfeited or because he resists being returned to the state for trial;

(6) a reasonable period of delay resulting from a continuance granted at the request of the state if the continuance is granted:

(A) because of the unavailability of evidence that is material to the state's case, if the state has exercised due diligence to obtain the evidence and there are reasonable grounds to believe the evidence will be available within a reasonable time; or

(B) to allow the state additional time to prepare its case and the additional time is justified because of the exceptional circumstances of the case;

(7) if the charge is dismissed upon motion of the state or the charge is disposed of by a final judgment and the defendant is later charged with the same offense or another offense arising out of the same transaction, the period of delay from the date of dismissal or the date of the final judgment to the date the time limitation would commence running on the subsequent charge had there been no previous charge;

(8) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, if there is good cause for not granting a severance;

(9) a period of delay resulting from detention of the defendant in another jurisdiction, if the state is aware of the detention and exercises due diligence to obtain his presence for trial;

(10) any period the defendant is released from custody without bail;

(11) any reasonable period of delay caused by exceptional circumstances not under the direct control of the state's attorney, including the completion, by another agency, of scientific analysis necessary to determine the offense to be charged; and

(12) any other reasonable period of delay that is justified by exceptional circumstances.

Acts 1977, 65th Leg., p. 1970, ch. 787, eff. July 1, 1978. Amended by Acts 1979, 66th Leg., p. 4, ch. 3, §1, eff. Sept. 1, 1979; Acts 1987, 70th Leg., ch. 383, § 2, eff. Sept. 1, 1987.

APPENDIX B

Tex. Code Crim. Proc. art. 28.061 (Vernon 1989)

Art. 28.061. Discharge for delay

If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial is sustained, the court shall discharge the defendant. A discharge under this article or Article 32.01 of this code is bar to any further prosecution for the offense discharged and for any other offense arising out of the same transaction, other than an offense of a higher grade that the attorney representing the state and prosecuting the offense that was discharged does not have the primary duty to prosecute.

Acts 1977, 65th Leg., p. 1972, ch. 787, § 4, eff. July 1, 1978. Amended by Acts 1987, 70th Leg., ch. 383, § 1, eff. Sept. 1, 1987.

Historical Note

The 1987 amendment rewrote the article which prior thereto read:

"If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial as required by Article 32A.02 is sustained, the court shall discharge the defendant. A discharge under this article is a bar to any further prosecution for the offense discharged and for any other offense arising out of the same transaction."

Section 3 of the 1987 amendatory act provides:

"(a) The change in the law made by this Act applies only to the prosecution of an offense committed

on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date."

"(b) The prosecution of an offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose."